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Abstract

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KEYWORDS: search, testing, seizure

Fourth Amendment Implications Of Public Sector Work Place Drug Testing

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I. Introduction

Imagine yourself as a public employee: perhaps a clerk in a social security office, a customs officer, a city police officer, fire fighter, or even a professor in a state supported law school. One morning you are informed that mandatory drug testing has been instituted by your employer — the government. Unless you are prepared to urinate in an offered bottle (perhaps in front of your supervisor in order to insure that the urine is your own), you will be immediately fired.[1] Does such

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1. The particular scenario is hypothetical and has several variants in real life. At

testing violate any rights guaranteed by the fourth amendment?[2]

Because the protection of the fourth amendment is applicable only against the government,[3] it will not limit the independent actions of private employers. Therefore, the scope of this article is limited to drug tests administered by government employers. The legal and policy issues involved with drug testing in the private sector work place will not be addressed here.

The fourth amendment protects against unreasonable government searches and seizures.[4] The opinions in most of the cases to date have focused the bulk of their analysis on whether or not drug testing was reasonable under the facts presented. There has been less examination of whether drug tests are searches or seizures at all.[5]

Whatever one may feel about drug testing, the unexamined as-

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times, the implementation of a drug testing program is announced in advance, but this is not always the case. Occasionally, set times for particular tests are given but often they are not. In some programs all employees are tested, while in others a sample of employees are chosen at random for testing. Not all programs require that the urine sample be collected while a supervisor observes but this is often recommended in order to determine that the sample tested actually was obtained from the employee subject to the test.

Although this article discusses "drug testing," its focus is upon testing conducted through the collection of bodily fluids, and in particular with urinalysis. Similar issues arise with blood sample testing. Although somewhat analogous, this article will not discuss the issues involved in the use of the polygraph to ask workers about drug use. This article is also particularly concerned with mass testing. Such testing appears in two forms, blanket testing (testing all workers in particular job categories or places of employment) and random testing (the selection of only some workers for testing based upon criteria *other* than individualized suspicion of work place drug use).

2. The right to be free from unreasonable searches and seizures contained in the fourth amendment has been held fundamental, "incorporated" into the fourteenth amendment's due process clause, and thus is applicable to the states. Wolf v. Colorado, 338 U.S. 25 (1938). *See also* Mapp v. Ohio, 367 U.S. 643 (1961). For convenience, reference will be made to the fourth amendment throughout this article.

3. *See, e.g.*, United States v. Jacobsen, 466 U.S. 109 (1984).

4.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

5. *Compare, e.g.*, City of Palm Bay v. Bauman, 475 So. 2d 1322 (Fla. 5th Dist. Ct. App. 1985) *with* Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F.2d 1264, 1267 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976).

sumption that such testing constitutes a search may lead to a nasty surprise when this issue eventually reaches the United States Supreme Court. Although drug testing would seem on its face to be a serious invasion of personal privacy, it does not meet the most common paradigm of a search and seizure. The government employer does not, itself, *take* the sample but rather, requires the employee to *give* the sample to the employer. Is this difference fatal to the fourth amendment claim?

Similarly, even if drug testing is found to be a search or seizure, under what conditions will testing be found to be reasonable? While several courts have considered this question, their conclusions have been inconsistent.[6]

Since it is clear that the issue of drug testing will be with us for some time, it is crucial that these fundamental questions receive early consideration so that the basic constitutional framework can be clearly understood.

II. Is Drug Testing a "Search" or "Seizure"?

A. *Early Search and Seizure Theory*

The conceptual framework for fourth amendment analysis begins with *Boyd v. United States*.[7] *Boyd* is a case with some very close parallels to the facts of drug testing situations. In *Boyd*, the government attempted to have the owner of goods alleged to have been imported fraudulently, forfeit the goods to the United States. The plaintiff in error claimed that no fraud had taken place and demanded return of the goods. The key to the case was comparing the true value of the imported goods to the value reported by the importer. In its attempt to show the true value, the government wanted to show the value of other glass previously imported. To do this, the government obtained a court order requiring the claimants to surrender the invoices of the previously imported glass. The invoices were submitted but the demand was objected to as being unconstitutional.[8]

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6. *Compare* Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.), *cert. denied*, 107 S. Ct. 577 (1986), holding random urine tests of jockeys reasonable in light of the status of horse racing as a pervasively regulated industry, *with* City of Palm Bay v. Bauman, 475 So. 2d at 1325, holding that drug testing of city police officers and fire fighters was unreasonable absent reasonable suspicion.

7. 116 U.S. 616 (1886).

8. *Id.* at 618-19. Failure to produce the documents without satisfactory explana-

The United States Supreme Court held that the order to produce the invoice and the statute upon which the order was based were unconstitutional.[9] A new trial was ordered where the information contained in the invoice would not be available to the government.[10]

The importance of *Boyd*, for the purposes of this discussion, rests not only on the decision, but also on the theory of the decision. The Court explicitly rejected the notion that no search had occurred because the government had not, itself, taken the papers. Instead, the Court declared that such forced compulsion was controlled by the fourth amendment in cases in which the amendment would govern if the conduct had been done by government agents themselves. As the Court stated:

> It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure.[11]

The issue addressed in this passage appears to be whether the government's conduct is a search or seizure under the fourth amendment. This analysis does not appear to be limited to private papers and can be viewed as distinct from the question of the reasonableness or unreasonableness of the conduct.[12] This is significant, because much of *Boyd* has been rejected by later Supreme Court decisions. In particular, the *Boyd* court's attempt to find protections in the fourth and fifth amendments,[13] which are not found in either amendment alone, has been re-

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tion permitted the matters claimed by the government to be contained in the records to be "taken as confessed." *Id.* at 620.

9. *Id.* at 638.

10. *Id.*

11. *Id.* at 622.

12. This has, seemingly, been recognized before. After quoting the key passage, one author states "This being a search and seizure then, was it an unreasonable search and seizure within the prohibition of the Constitution?" N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 108 (1937) (De Capo reprint ed. 1974).

13. Perhaps significantly, the Supreme Court seemed to recognize the fourth amendment basis of *Boyd* in Andresen v. Maryland, 427 U.S. 463 (1976), a case rejecting the notion that a search warrant for papers violated the fifth amendment because nothing was compelled from the petitioner himself. The Court quoted the

jected by the Supreme Court.[14] Furthermore, the sweeping protection of a person's papers under the fifth amendment has been rejected.[15] If these rejected premises were the basis of the holding quoted above, then it too would be suspect. Specifically, the Court held that conduct will be considered to be a fourth amendment search and seizure if it has the "sole object and purpose of search and seizure,"[16] and would be a search and seizure if done by the government directly.[17]

Yet, it is only when the Court in *Boyd* turns to the question of the reasonableness of the conduct that the now famous "blending" of fourth and fifth amendment principles appears to take place.[18] In its

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"linkage" language from *Boyd* ("we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself"), *Boyd*, 116 U.S. at 633, labelled it, apparently in the fifth amendment context, *dicta* and went on to explain that the true basis for *Boyd* was the fourth amendment.

> We recognize that the continued validity of the broad statements contained in some of the Court's earlier cases has been discredited by later opinions. In those earlier cases, the legal predicate for the inadmissibility of the evidence seized was a violation of the fourth amendment; the unlawfulness of the search and seizure was thought to supply the compulsion of the accused necessary to invoke the Fifth Amendment.

Andresen, 427 U.S. at 472.

14. Schmerber v. California, 384 U.S. 757 (1966).

15. *See Andresen*, 427 U.S. at 463 and Fisher v. United States, 425 U.S. 391 (1976).

16. *Boyd*, 116 U.S. at 622.

17. By contrast, the fifth amendment stands which *Boyd* took have not fared well. The notion that papers are absolutely protected from production by the self-incrimination clause has been repudiated, and the broad implication that the forced production of any evidence, as opposed to testimonial communications, violates the fifth amendment has also not survived. Further, the entire notion that the fourth and fifth amendments act together to create a zone of privacy larger than either would provide alone has been repudiated. Therefore, if the discussion of the concept of "search" rested upon such concepts, it would also not survive. To the extent, however, that this discussion was severable from these discredited points, the analysis would still be viable.

18.

> If the Boyds were to prevail on fourth amendment grounds, several issues had to be resolved in their favor: (i) whether the forced production of papers was a search within the meaning of the fourth amendment; (ii) whether the protections of the fourth amendment extended to forfeiture proceedings; (iii) whether competent but illegally obtained evidence must be excluded. . . . But most significant for our present purposes is Justice Bradley's treatment of the third issue, 'the most creative, and most controversial feature of his opinion,' wherein he linked together the Fourth and

initial discussion of whether the conduct was cognizable under the Constitution at all, it is the fourth amendment alone that is relied upon.[19]

Fifth Amendments.

1 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment 6 (1978) (footnotes omitted). Thus, Professor LaFave suggests that the linkage of the amendments is aimed at the issue of exclusion. It can be argued that it is also aimed at the issue of the reasonableness of the conduct. Professor LaFave would appear to agree that the linkage of the fourth and fifth amendments was *not* aimed at the question pertaining to the *definition* of the terms "search" or "seizure," but rather to analytically severable concerns. *See also* Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 Harv. L. Rev. 945, 952 (1977), suggesting that "the subpoena at issue in *Boyd* clearly satisfied the requirements of the fourth amendment warrant clause," but "during the nineteenth century compliance with the warrant clause was not by itself sufficient to validate a search and seizure; the appellants' fourth amendment claim therefore required that the court also decide whether the seizure was 'reasonable.' " This supports the notion that the major part of the opinion, including the linkage of the two amendments, was part of a discussion of the reasonableness of the search and seizure and not whether one had taken place at all. The Harvard note also rejects the notion that the linkage was necessary to obtain a result which could not have been achieved by the use of either amendment alone.

> This statement [the linkage] did not mean, as many commentators have suggested, that the Court believed invocation of both amendments necessary to achieve a result which neither could have accomplished alone. It merely pointed to a significant overlap in the protections provided by the two amendments. That these two amendments should independently protect a person's books and papers was for Justice Bradley all the more reason to place the individual's private communications in a special position beyond the government's reach.

Id. at 955-56.

19.

> But in regard to the *Fourth Amendment*, it is contended that, whatever might have been alleged against the constitutionality of the acts of 1863 and 1867, that of 1874, under which the order in the present case was made, is free from constitutional objection, because it does not authorize the search and seizure of books and papers, but only requires the defendant or claimant to produce them, the allegations which it is affirmed they will prove shall be taken as confessed. This is tantamount to compelling their production; for the prosecuting attorney will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of. It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting, and to this extent the proceeding under the act of 1874 is a mitigation of that which was authorized by the former acts; but it accomplishes the substantial object of those acts in forcing from a party evidence against himself.

It is only after this principle is established that the Court in *Boyd* turned to the separate issue of whether the search and seizure was reasonable.[20] Thus, whatever erosion may have taken place as to the *Boyd* Court's analysis of the concept of "reasonableness" would not have a direct impact on their search and seizure analysis.[21]

Boyd, 116 U.S. at 621-22 (*emphasis added*). The Court then continued with the language quoted in the text.

Although the Court discusses the notion that evidence is forced from the defendant himself, this reference is within a discussion of the fourth and not the fifth amendment. This passage should not be read, therefore, as an attempt to invoke the privilege against self-incrimination. Rather the fourth amendment concepts of "search" and "seizure" are held to include the taking of evidence by the state directly or, in the alternative, procedures which have the effect of requiring the defendant himself to give the evidence up or face some government imposed sanction.

Under this analysis, requiring a worker to submit a urine sample or be fired would be a "search and seizure," leaving only the question of whether the requirement was "unreasonable."

20.

> The principal question, however, remains to be considered. Is a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a processing to forfeit his property for alleged fraud against the revenue laws — is such a proceeding for such a purpose an '*unreasonable* search and seizure' within the meaning of the fourth amendment of the Constitution? [O]r, is it a legitimate proceeding?

Boyd, 116 U.S. at 622 (*emphasis in original*).

21. The bulk of the Court's opinion is addressed to the "reasonableness" question. The history of governmental searches and seizures is examined and it is in that context that considerations of the "property" interest in goods and papers is considered.

At the conclusion of its review of the historical permissibility of various searches and seizures, the Court invokes the "intimate relation between the two amendments," *Boyd*, 116 U.S. at 633, asserting that

> [t]hey throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure within the meaning of the Fourth Amendment.

Id.

It would appear, then, that this discussion, and the linkage of the two amendments, is made *not* to define the meaning of the terms "search" and "seizure," but rather to ascertain whether the search and the seizure were reasonable. It may well be that Boyd won his case because the Court viewed the scope of reasonable searches to be narrower than would the Court today. Specifically, the Court viewed the search and

For our purposes then, *Boyd* can be read to support the proposition that conduct which would be a search or seizure if performed by government agents is the equivalent of a search and seizure when performed under government threat of sanction to the holder of the evidence in question. Thus, it is included within the range of protection under the fourth amendment's "search" and "seizure" terms.[22] Fur-

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seizure as violating the right against self-incrimination, which under the dual amendment analysis also reinforces the determination that the search is unreasonable. The fifth amendment analysis would fail today after cases like *Fisher* and *Andresen*. Similarly, today it is doubtful that conduct which violates the fifth amendment would, by virtue of that fact, be viewed as more unreasonable under the fourth amendment. However, none of this undercuts the Court's analytically severable and prior holding that the conduct amounted to a search and seizure. Only this issue is necessary to the drug testing issue.

Support for the existence of two distinct issues in *Boyd* comes from an unlikely source — Mr. Justice Miller's concurring opinion, in which he supports the majority based upon the fifth amendment, but specifically rejects the notion that any search or seizure has occurred under the fourth amendment. The concurrence argues that searches are only those things which lead to seizures and that since, under the statute, custody of the papers remained with the owner, no seizure, and hence no search, had taken place. "There is in fact no search and no seizure authorized by the statute. No order can be made by the court under it which requires or permits anything more than service of notice on a party to the suit." *Id.* at 639 (Miller, J., concurring). "Nothing in the nature of a search is here hinted at. Nor is there any seizure, because the party is not required at any time to part with the custody of the papers." *Id.* at 640.

> But what search does this statute authorize? If the mere service of a notice to produce a paper to be used as evidence which the party can obey or not as he chooses is a search, then a change has taken place in the meaning of words, which has not come within my reading, and which I think was unknown at the time the Constitution was made. The searches meant by the Constitution were such as led to seizure when the search was successful. But the statute in this case uses language carefully framed to forbid any seizure under it, as I have already pointed out.

Id. at 641. Drug testing involves a process of coercion designed to lead to a seizure of urine otherwise unavailable from the employee. Mere inspection of the urine is not the aim of such testing. Custody of it is taken by the government and it is not returned to the employee.

22. Let us suppose, for example, that government agents came to your home and told you that unless you allowed them to enter the house and take certain specified articles, they would beat you. The consent to search would not stand and the conduct would be an unlawful search. *Boyd* proposes that the situation would be no different for constitutional purposes if the police threatened to beat you unless you went into the house and returned with the articles in question. Similarly, requiring an employee to take and deliver to the government a urine sample, under pain of dismissal from employment, would be treated just as if the government, itself, had taken the sample. This

thermore, the *Boyd* Court appears to have recognized that this question is analytically distinct from the question of whether a particular search and seizure is reasonable.[23] Thus, under this analysis a governmental requirement to either surrender a urine sample or be fired amounts to a search and seizure[24] as those terms were understood by the Court in *Boyd*.[25]

Even if the undercutting of *Boyd* does not touch its analysis of the concepts of "search and seizure," do any later changes in fourth amendment doctrine destroy it? The procedure used in *Boyd* was essentially that of a *subpoena duces tecum*,[26] and it is to a consideration of that procedure that we now turn.

Here, too, it must be remembered that two very different questions are raised. The first is whether such a subpoena is a search or seizure? Secondly is the search or seizure reasonable? Only the answer to the

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is significantly different than the "private search" situation where a private person, without government prompting, conducts a "search" and, on his own, turns evidence over to the government.

23. Or, as Professor LaFave suggests, the issue of whether illegal evidence should be subject to exclusion. 1 W. LAFAVE, *supra* note 18, at 6.

24. Or its constitutional equivalent.

25. This discussion attempts to rehabilitate that part of *Boyd* which arguably still exists, and which may have been over-looked as other parts of *Boyd* were rejected. That *Boyd* (even after the rejection of the linkage of the fourth and fifth amendments, the demise of the mere evidence rule, the constriction of the scope of the fifth amendment, and the shift to privacy values in Katz v. United States, 389 U.S. 347 (1967)) still contains some important insight into fourth amendment values may help to explain why the case has not been overruled.

An alternate and gloomier analysis is also viable. An excellent examination of the case, Note, *The Life and Times of Boyd v. United States (1886-1976)*, 76 MICH. L. REV. 184 (1977) traces the theory of *Boyd* from its start as the great protector of property rights, to a shift to privacy as the fundamental right to be protected, to a belief that privacy rights are relative rather than absolute to a radical narrowing of privacy rights as the values of crime control gained dominance over values protecting self-incrimination. The author states,

> In light of *Andresen* and *Fisher*, *Boyd* is dead. No zone of privacy now exists that the government cannot enter to take an individual's property for the purpose of obtaining incriminating information. In most cases, the zone can be entered by the issuance of a subpoena; in the rest it can be breached by a search warrant. . . . [a]ccordingly, *Boyd* is dead.

Id. at 211-12. *See also*, Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945 (1977).

26. Note, *Formalism, Legal Realism, and Constitutional Privacy Under the Fourth and Fifth Amendments*, *supra* note 25, at 952.

first of these questions is relevant to our consideration of drug testing.

The answer to the questions, while not entirely clear, seems to be that there are search and seizure aspects even to such subpoenas sufficient to bring them within the ambit of the fourth amendment. However, the differences between warrants and subpoenas allow the latter to be upheld as reasonable without meeting many of the requirements of the former.[27] Moreover, since the actual demand for the production of the invoice at issue in *Boyd* might be held to be reasonable today, the Court has retreated from *Boyd's* holding in the context of subpoenas. This is distinguishable, however, from the threshold question of whether the conduct is controlled by the fourth amendment.

A subpoena to appear before a grand jury was held not to constitute a seizure of the person in *United States v. Dionisio*.[28] This was largely based upon the unique historical role of the grand jury and the duty of citizens to appear before it when asked.[29] At the same time, the Court appeared to acknowledge that the fourth amendment was not wholly inapplicable even to grand jury subpoenas. "The Fourth Amendment provides protection against a grand jury *subpoena duces tecum* too sweeping in its terms 'to be regarded as reasonable.' "[30]

Quoting with approval *United States v. Doe (Schwartz)*,[31] the Court pointed out other differences:

> The latter is abrupt, is affected with force or the threat of it and often in demeaning circumstances, and, in the case of arrest, results in a record involving social stigma. A subpoena is served in the same manner as other legal process; it involves no stigma whatever; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times under the control and supervision of a court.[32]

The relation between drug testing and the subpoena process is

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27. "By contrast, the Fourth Amendment protections, while not nonexistent, fall far short of the limitations which that Amendment imposes upon the use of search warrants. However, this is not to suggest that what Fourth Amendment protections do exist are unimportant." 1 W. LAFAVE, *supra* note 18, at 189.

28. 410 U.S. 1 (1973).

29. "There are recent reaffirmations of the historically grounded obligation of every person to appear and give his evidence before the grand jury." *Id.* at 9.

30. *Id.* at 11 (quoting Hale v. Henkel, 201 U.S. 43, 76 (1906)).

31. 457 F.2d 895 (1972).

32. *Dionisio*, 410 U.S. at 14 (quoting United States v. Doe (Schwartz), 457 F.2d 895, 898 (2d Cir. 1972), *cert. denied*, 410 U.S. 941 (1973)).

practically nil. Drug testing is much closer to a traditional search than to a subpoena. Although drug testing involves the threat of sanctions other than the immediate use of force, it is demeaning. It requires the employees to expose the most private and intimate part of his or her body and the surrender of bodily fluids. The manner of conducting a drug test is nothing like simply handing a piece of paper to a person. The time and place of the test is chosen by the employer and cannot be altered by the employee since this would defeat the surprise element of the test and reduce its effectiveness in discovering drug residues in the body. Furthermore, the entire procedure is solely under control of the government agents conducting it. Prior to the test, there is no control and supervision of these tests by a court.

The *Dionisio* court also rejected the contention that the compelled production of a voice exemplar violates the fourth amendment. This is because the quality and nature of a person's voice is so generally exposed to the public, one can have no reasonable expectation of privacy in it. In contrast, the Court has held that there is a constitutionally protected reasonable expectation of privacy in bodily fluids.[33] Also, urine is not exposed to the public. Rather, it is stored within the body until eliminated in private. This strongly supports the view that a government order to produce such fluids would have to meet the requirements of the fourth amendment.

Not everyone would agree that the fourth amendment applies to subpoenas. For example, Judge Friendly suggested that the real basis for control of a subpoena might be the due process clause rather than the fourth amendment.[34] Yet, it seems that the fourth amendment has not been definitively ruled out even of the subpoena process. Its special nature and the limited intrusion which usually accompany it actually address the issue of the *reasonableness* of the subpoena under the fourth amendment.[35] Subpoenas which are reviewable by the court

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33. Schmerber v. California, 384 U.S. 757 (1966).

34. *In re* Grand Jury Subpoena Served Upon Simon Horowitz, 482 F.2d 72 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973).

35. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946), a case decided well before Katz v. United States, 389 U.S. 347 (1967), at a time when physical trespass into a constitutionally protected area was required for a search, states that no actual search or seizure is involved with a subpoena but only a "figurative" or "constructive" one. Yet, the Court went on to balance interests, concluding that the issue was one of reasonableness, establishing three guidelines (legitimate investigatory purpose, relevance, and some degree of specificity linked to the purpose of the investigation and making it possible to figure out what documents are being demanded). *See gener-*

before anything must be produced are in many ways less instrusive than more traditional searches and seizures[36] and require less to be reasonable. In *In re Nwamu*,[37] a demand that subpoenaed items be handed over at once violated the fourth amendment. Arguably, this was because the manner of its execution took on more of the characteristics of a traditional search, lacking only the actual entry by the government agent. Similarly, drug testing is much more intrusive than a subpoena. No delay is permited and there is no mechanism for "before the fact" judicial review.

It appears that the fourth amendment extends even to intrusions as limited as subpoena's. Drug testing, moreover, is significantly more intrusive than a subpoena. Except for the lack of physical government taking of the sample, it appears to be much closer to the degree of intrusion found in a traditional search and seizure. Even though portions of *Boyd* have been rejected, the portion relevant to the drug testing issue appears to be undisturbed by later cases. When a defendant is forced to hand over evidence by government agents and under a threat of sanction for refusal, a search and seizure under the fourth amendment has occured. This narrow point is all that is required to find that mandatory drug testing is a search and seizure.

B. *Modern Search and Seizure Theory*

The most important modern change in the theory of the fourth amendment followed the decision in *Katz v. United States*[38] and its progeny. Have the theoretical changes in the fourth amendment analy-

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ally 2 LaFave, *supra* note 18, at 195-206. Arguably, this is consistent both with *Boyd*'s view and with recent Supreme Court cases in which it is suggested that when a warrant is not necessary, due to the special nature of the search or seizure involved (often involving either an exaggerated need on the part of the government to search, a limited intrusion, or an already reduced expectation of privacy), the only limitation upon the conduct is "reasonableness" determined by an ad-hoc balancing process. *See* New Jersey v. T.L.O., 469 U.S. 325 (1985); United States v. Montoya de Hernandez, 469 U.S. 1204 (1985); and United States v. Villamonte-Marquez, 462 U.S. 579 (1985). Thus, with the usual subpoena situation, the intrusion is much less than with a more traditional search, rendering a warrant unnecessary. Further, the balancing approach leads to the discarding of many traditional requirements which would accompany a warrant, but still requires that the scope and purpose of the demands be reasonable.

36. 2 LaFave, *supra* note 18, at 209.
37. 421 F. Supp. 1361 (S.D.N.Y. 1976).
38. 389 U.S. 347 (1967).

sis supported or undermined the portion of *Boyd* relied upon here?

In *Katz*, FBI agents placed electronic devices on the exterior of a public phone booth. Petitioner made calls from the booth which were overheard and recorded.[39] Not only was there no physical trespass into the telephone booth, but the agents did not force petitioner to do anything. Instead, they merely provided themselves with the ability to hear and record if the unknowing petitioner decide to use the booth. Rather than entering a private area already controlled by petitioner, the government arranged to monitor an area and waited until petitioner attempted to use it as a private area at a later time. Thus, *Katz* itself was not the typical or paradigm search pattern.

The Court rejected the notion that a physical trespass was required for a search or seizure to have taken place.[40] Stating that the amendment safeguards the protection of "people, not places,"[41] the Court determined that a search and seizure had taken place because the government's activities had violated petitioner's reasonable expectation of privacy.[42]

The widely followed concurrence by Justice Harlan explained the majority opinion as a "two-prong" test: "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' "[43]

In recent years, the Supreme Court has often begun its analysis with the Harlan test.[44] This is combined with part of the majority language which states: "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment

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39. *Id.* at 348.

40. "We conclude that the underpinnings of Olmstead [v. United States, 277 U.S. 438 (1928)] and Goldman [v. United States, 316 U.S. 129 (1924)] have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling." *Katz*, 389 U.S. at 353.

41. *Id.* at 351.

42. "The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the fourth amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance." *Id.* at 353.

43. *Id.* at 361 (Harlan, J., concurring).

44. *See, e.g.*, United States v. Knotts, 460 U.S. 276, 280-81 (1983); Hudson v. Palmer, 468 U.S. 517 (1984).

before anything must be produced are in many ways less instrusive than more traditional searches and seizures[36] and require less to be reasonable. In *In re Nwamu*,[37] a demand that subpoenaed items be handed over at once violated the fourth amendment. Arguably, this was because the manner of its execution took on more of the characteristics of a traditional search, lacking only the actual entry by the government agent. Similarly, drug testing is much more intrusive than a subpoena. No delay is permited and there is no mechanism for "before the fact" judicial review.

It appears that the fourth amendment extends even to intrusions as limited as subpoena's. Drug testing, moreover, is significantly more intrusive than a subpoena. Except for the lack of physical government taking of the sample, it appears to be much closer to the degree of intrusion found in a traditional search and seizure. Even though portions of *Boyd* have been rejected, the portion relevant to the drug testing issue appears to be undisturbed by later cases. When a defendant is forced to hand over evidence by government agents and under a threat of sanction for refusal, a search and seizure under the fourth amendment has occured. This narrow point is all that is required to find that mandatory drug testing is a search and seizure.

B. *Modern Search and Seizure Theory*

The most important modern change in the theory of the fourth amendment followed the decision in *Katz v. United States*[38] and its progeny. Have the theoretical changes in the fourth amendment analy-

ally 2 LAFAVE, *supra* note 18, at 195-206. Arguably, this is consistent both with *Boyd*'s view and with recent Supreme Court cases in which it is suggested that when a warrant is not necessary, due to the special nature of the search or seizure involved (often involving either an exaggerated need on the part of the government to search, a limited intrusion, or an already reduced expectation of privacy), the only limitation upon the conduct is "reasonableness" determined by an ad-hoc balancing process. *See* New Jersey v. T.L.O., 469 U.S. 325 (1985); United States v. Montoya de Hernandez, 469 U.S. 1204 (1985); and United States v. Villamonte-Marquez, 462 U.S. 579 (1985). Thus, with the usual subpoena situation, the intrusion is much less than with a more traditional search, rendering a warrant unnecessary. Further, the balancing approach leads to the discarding of many traditional requirements which would accompany a warrant, but still requires that the scope and purpose of the demands be reasonable.

36. 2 LAFAVE, *supra* note 18, at 209.
37. 421 F. Supp. 1361 (S.D.N.Y. 1976).
38. 389 U.S. 347 (1967).

sis supported or undermined the portion of *Boyd* relied upon here?

In *Katz*, FBI agents placed electronic devices on the exterior of a public phone booth. Petitioner made calls from the booth which were overheard and recorded.[39] Not only was there no physical trespass into the telephone booth, but the agents did not force petitioner to do anything. Instead, they merely provided themselves with the ability to hear and record if the unknowing petitioner decide to use the booth. Rather than entering a private area already controlled by petitioner, the government arranged to monitor an area and waited until petitioner attempted to use it as a private area at a later time. Thus, *Katz* itself was not the typical or paradigm search pattern.

The Court rejected the notion that a physical trespass was required for a search or seizure to have taken place.[40] Stating that the amendment safeguards the protection of "people, not places,"[41] the Court determined that a search and seizure had taken place because the government's activities had violated petitioner's reasonable expectation of privacy.[42]

The widely followed concurrence by Justice Harlan explained the majority opinion as a "two-prong" test: "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' "[43]

In recent years, the Supreme Court has often begun its analysis with the Harlan test.[44] This is combined with part of the majority language which states: "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment

39. *Id.* at 348.
40. "We conclude that the underpinnings of Olmstead [v. United States, 277 U.S. 438 (1928)] and Goldman [v. United States, 316 U.S. 129 (1924)] have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling." *Katz*, 389 U.S. at 353.
41. *Id.* at 351.
42. "The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the fourth amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance." *Id.* at 353.
43. *Id.* at 361 (Harlan, J., concurring).
44. *See, e.g.*, United States v. Knotts, 460 U.S. 276, 280-81 (1983); Hudson v. Palmer, 468 U.S. 517 (1984).

protection."[45]

Under the Court's recent analysis, the employee's mere desire for privacy is not sufficient to invoke fourth amendment protection. The expectation of privacy must be reasonable.

The "reasonable" prong of the test has come to mean two very different things. First, it has tested whether or not the person desiring privacy has taken steps to attempt to secure it. This might be called the "physicality" of the situation. Where were the observer and the observed? What physical barriers existed to prevent observation? Failure to take any steps to secure privacy has proved fatal to the fourth amendment claim.[46]

The second part of the "reasonable" prong has recently taken on increased importance. The question is whether the privacy expectation in the information sought to be concealed or in the area sought to be kept free from observation is worthy of fourth amendment protection. This involves an inquiry into what types of information and what areas society views as private, how society lives, what it values, etc.

The Court has recently held that some places, such as open fields and prison cells, do not warrant protection regardless of the steps taken to preserve privacy.[47] Additionally, some information itself is unworthy of privacy protection. The vehicle identification number of an automobile as held to be one such piece of information because of its important role in the pervasive regulation of motor vehicles.[48]

Contraband is similarly unworthy of protection.[49] If such information can be discovered without committing a search or seizure, the information itself is not private.[50] By contrast, the Constitution and case law specifically recognize the person as worthy of protection. The at-

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45. *Katz*, 389 U.S. at 351.
46. *See, e.g.*, California v. Ciraolo, 106 S. Ct. 1809 (1986).
47. Oliver v. United States, 466 U.S. 170 (1984); *Hudson*, 468 U.S. at 517.
48. New York v. Class, 106 S. Ct. 960 (1986).
49. United States v. Jacobsen, 446 U.S. 380 (1984).
50. Even "non-private" information may be kept in a private place. Thus, a search of a suitcase to reveal drugs would not be permissible even though the information about drugs itself was not private. If, however, the information that there were drugs in the suitcase could be discovered *without* a search, say by use of a dog trained to sniff odors emanating from the bag, the acquisition of that information would not invoke any fourth amendment protection. United States v. Place, 462 U.S. 696 (1983). Similarly, when a private search put contraband in plain view of the police, a field test of the drugs which revealed only whether or not it was contraband was not a search. *Jacobsen*, 466 U.S. at 109.

tempt to find hidden aspects of a person, such as bodily fluids, has been recognized as a search.[51]

Boyd did not find it necessary to separately analyze the concepts of search and seizure. The analysis of the concept of "seizure" is still less well developed than that dealing with the concept of "search."[52] It may be said, however, that since the time of *Katz v. United States*,[53] a search has been understood as a governmental violation of one's reasonable expectation of privacy. Modern cases suggest that, at least where tangible items are involved, a seizure requires some interference with one's possessory interest in the item seized.[54] Furthermore, when dealing with seizures of the person, any interference with the right of a person to go about his business will qualify, even if the duration of intrusiveness is insufficient to amount to an arrest.[55]

1. *Is Drug Testing a Search Under the Theory of Katz?*

The question might be posed this way: Is focused governmental activity aimed at acquiring the employee's urine against the employee's will, by means of direct threats of sanctions imposed by government upon the employee, an invasion of the employee's legitimate privacy expectation?

The requirements of *Katz* would strongly suggest that the answer to this question is "yes." Private aspects of the person, particularly body fluids,[56] have been recognized as entitled to fourth amendment

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51. Schmerber v. California, 384 U.S. 757 (1966). This would contrast with the lack of any privacy expectation in the physical characteristics of a person's face or voice since these things are constantly exposed to the public.

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> To be sure, the cases are somewhat at odds over whether the collection and subsequent testing of a urine specimen is a 'search,' a 'seizure,' or both. But while the precise characterization might vary, perhaps depending upon the details of the testing program, the cases uniformly hold that the Fourth Amendment does apply to the kind of testing about which you inquire.

71 Op. Att'y Gen. 6 [Maryland] (1986) [opinion No. 86-055, (Oct. 22, 1986)].

53. 389 U.S. 347 (1967).

54. This analysis is less helpful when dealing with the seizure of intangibles such as a voice or a visual image of something but that issue is beyond the scope of the present article. The seizures involved in drug testing are either of the person or of the urine (or blood) sample. Both are tangible.

55. *See* Terry v. Ohio, 392 U.S. 1 (1968).

56. *Schmerber*, 384 U.S. at 757.

protection.

It may be contended that urine is a waste product and that the employee holds it in his or her body specifically for the purpose of disposing of it.[57] While this is true, this contention fails to recognize that

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57. In his special concurrance in National Treasury Employees Union v. Von Raab, 649 F.2d 380 (5th Cir. 1987), Judge Patrick E. Higginbotham questioned whether urinalysis was a search or seizure at all.

> There is a substantial question whether requiring the samples as a condition for hire for the three job categories is a search or seizure at all. . . . If the government has the right to insist upon proof that its policemen of drug dealers not be drug dealers, and surely it does, the reasonableness of any invasion of right and the correlative reasonableness of the expectation of privacy is a function of the relevance of the job requirement to the job to be done.

Id. This view is truly disturbing. Although the government's need for specific information is one part of the calculus to determine the reasonableness of a search or seizure (balanced against the severity of the intrusion to the citizen), if the need of the government for information alone can negate *any* reasonable expectation of privacy, then the government's acts are not searches at all. The assumption is that this position would be equally applicable to governmental demands to enter and rummage through the contents of a home or office. It is not disputed that the government has a legitimate interest in effective job performance of its employees. The question is what limits exist to the means by which the government can seek to insure this interest. Under Judge Higginbotham's analysis the answer would quickly be that there are no limits at all.

Judge Higginbotham also questions both whether there can be any reasonable expectation of privacy in a waste product and suggests that the privacy invasion involved is minor; "persons using public toilet facilities experience a similar lack of privacy." *Id.* While it is true that urine is a waste product, that does not end the inquiry. Trash is a waste product but this does not mean that police can enter a home to look for it. Similarly, it is suggested that the government can't force a citizen to dispose of his trash at a time and place convenient for police inspection. In drug testing programs, the government demands that the urine be eliminated at a time and place of the government's choosing and in a manner uncommon to societal norms. Naturally this defeats all attempts to keep the contents of the urine private.

Finally, Judge Higginbotham's analogy to a public rest room fails. Leaving aside for a moment the additional invasion of privacy which exists because the government seeks to control the time, place, and method of urination, something which on its face sounds grotesque, the analogy is still weak. While this author can't speak from experience about the social mores and customs attached to the use of women's public rest rooms, he can make some comments about those used by men. Stalls are equipped with doors and although urinals are not, there is an unspoken custom that men do not watch other men urinate.

It is crucial in discussing issues of privacy that the real world be taken into account. Although it may seem in questionable taste even to discuss the use of the urinal in a law review article, this author suggests that this too is a sign that such things are considered private.

such elimination has historically been viewed as a private activity by our society. Generally, private areas are provided for this function.

Privacy is expected during urination. Breaches of this expectation would be considered extremely rude. Some could be redressed in invasion of privacy actions. The structures built for waste elimination, moreover, are designed so that the waste is immediately mixed with water and carried away in a form which would be useless for testing and impossible to recover by means presently in use.

The current process of drug testing requires that people turn this private function into a public one. Most experts suggest that employees be watched during urination to insure that the sample received actually comes from the person tested. Other experts suggest that the room where the sample is taken be controlled and that other steps be taken to insure the integrity of the sample. The time and place of the elimination are selected by a person other than the individual and often against his will. Thus, drug testing makes the individual subject to the control and will of another during an activity generally considered personal to the individual. To most, the process of being so intimately controlled will seem demeaning, emotionally trying, and invasive of the bodily integrity and privacy so dear to us.[58] While no absolute measure of what makes a privacy expectation reasonable exists, surely so intimate an invasion must qualify.

Also, urine contains information worthy of protection. Even if it was held that there is no reasonable expectation of privacy in the knowledge that drug residue is in the body, a urine sample can test more than this. Urine tests can reveal pregnancy, diseases, etc.[59] In short, by requiring an employee to give a urine sample to the govern-

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58. It is an insufficient answer that urine tests are sometimes conducted for legitimate medical purposes. A test which is administered at the request of a patient for his or her own reasons is significantly different than a test conducted against the will of the person being tested in order to uncover evidence of his or her wrongdoing.

59. Stille, *Drug Testing: The Scene is Set for a Dramatic Legal Collision Between the Rights of Employers and Workers*, Nat'l L.J., Apr. 7, 1986, at 1, reported the following:

> "A simple thing like urine can tell you a lot," says Dr. Harold M. Bates, a chemist with Metpath Laboratories of Teterboro, N.J., which performs drug test analysies. It can tell a company whether an employee is being treated for a heart condition, manic-depression, epilepsy, diabetes or schizophrenia. A company may be tempted to get rid of workers with medical problems, he says, "even though they may be doing a perfectly good job."

See also, e.g., McDonell v. Hunter, 612 F. Supp. 1122, 1127 (D. Iowa 1985), *modified*, 809 F.2d 1302 (8th Cir. 1987).

ment employer, the government is given the tool to discover many private facts about the individual.

The outcome should not be changed because the government agent has not physically seized the sample. Both *Boyd* and *Katz* suggest it is the breach of protected interests (whether property or privacy) that is key, and not the particular means employed by the government.[60] A visual or auditory acquisition of information can be a search under *Katz*.[61] Here, in a quest for information, government agents threaten a worker until the evidence is revealed. In *Katz* itself, agents took certain steps to obtain a hidden vantage point (devices were placed on the outside of the phone booth) and then waited until the defendant unwittingly revealed the information by speaking into the telephone. If this is a search, then it would seem incongruous to say that a situation where direct threats are applied to the defendant for the purpose of causing the exposure of evidence is not a search. In neither case is the paradigm of a search met. Yet, the Court in *Katz* had no trouble finding that a search had taken place. The same result should be found in the drug testing situation.[62]

The contention that the fourth amendment does not apply when the government acts as an employer rather than in a law enforcement capacity must also be rejected. In *New Jersey v. T.L.O.*,[63] the Court

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60. *Compare*, Boyd v. United States, 116 U.S. 616, 630 (1886), where the Court stated:

> It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense, it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.

with Katz v. United States, 389 U.S. 347, 353 (1967),

> The government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

61. 389 U.S. at 349.

62. The Attorney General of Maryland, Stephen Sachs, recently concluded that the fourth amendment applied to mandatory drug testing. 71 Op. Att'y Gen. (1986). *See also, e.g.*, Patchogue-Medford Congress of Teachers v. Board of Educ., 119 A.D.2d 35, 505 N.Y.S.2d 888 (App. Div. 1986). It appears to be the consensus of courts considering the question that drug testing is a search.

63. 469 U.S. 325 (1985).

held that the fourth amendment applies to searches of public school children by teachers and administrators. The Court stated: "[T]his Court has never limited the amendment's prohibition on unreasonable searches and seizures to operations conducted by the police. Rather, the Court has long spoken of the fourth amendment's strictures as restraints imposed upon 'governmental action' — that is, 'upon the activities of the sovereign authority.' "[64] The Court noted that "the individual's interest in privacy and personal security 'suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards.' "[65] The same reasoning would apply to work rules set by government employers.[66]

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64. *T.L.O.*, 469 U.S. at 335. The Court went on to note that the amendment had been applied to building inspectors, OSHA inspectors, and fire fighters.

65. *Id.* (partially quoting Marshall v. Barlow's Inc., 436 U.S. 307, 312-13 (1978)).

66. This same position was taken in *McDonell*, 612 F. Supp. at 1122, in which the government argued and the court rejected the notion that the fourth amendment did not apply because the testing in question was being conducted for reasons other than criminal investigation.

Although the district court's analysis of the reasonableness of urinalysis was modified by the court of appeal recently, that court agreed that urinalysis is a search under the fourth amendment. "We agree with those courts which have held that urinalysis is a search and seizure within the meaning of the fourth amendment." McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987). A case suggesting the opposite result is Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985). While reluctantly holding that urinalysis is a search, the court then appeared to hold that when government acted as an employer it could make any search which a private employer could make. Although couched as an analysis of "reasonableness," such a holding would have the effect of making the fourth amendment inapplicable to governmental employers. The case was decided before *T.L.O.*, and would seem to be inconsistent with it. Further, the actual facts of the case involved testing only of workers singled out by an undercover agent and for which there was ample reason to suspect drug use.

O'Connor v. Ortega, 107 S. Ct. 1492 (1987) (Plurality), decided when this article was at the printer, declined, in a footnote, to decide the issue of drug testing. Nonetheless, it did recognize that employees have a reasonable expectation of privacy in areas such as office desks and filing cabinets. The plurality stated that "investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances." *Id* at 1503. Reasonable suspicion of misconduct will meet this standard. The plurality also stated, however, "Because the petitioners had an 'individualized suspicion' of misconduct by Dr. Ortega, we need not decide whether individualized suspicion is an essential element of the standard of reasonableness that we adopt today." *Id*. Urinalysis, a much more intimate and personal search, and a search of an area not owned by the employer, logically must require no less a standard than that required for office searches and arguably would require more. Reasonable individualized suspicion would seem to be the minimum acceptable standard.

The fourth amendment applies to government workers. While the government employer can set terms of employment, there is no absolute right to negate the constitutional rights of workers as a condition of employment.[67] Similarly, the government cannot negate fourth amendment rights merely by announcing its intention to test.[68] This also suggests that attempts to twist mandatory drug testing into some form of "implied consent" on the part of the employee is unlikely to, and should not succeed.[69] This is especially true where the occupation in-

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67. While there is no right to public employment, this does not mean that the governmental employer is totally free to set any conditions on the employment which it desires. Slochower v. Board of Higher Educ. of New York City, 350 U.S. 551 (1956), for example, invalidated the dismissal of a public school teacher for invoking the fifth amendment before a congressional committee. "To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by proper authorities." *Id.* at 553. *See also, e.g.* United States v. Robel, 389 U.S. 589 (1967), and Pickering v. Board of Educ., 391 U.S. 563 (1968). As Stephen Sachs put it:

> Nor does the mere fact of State employment negate this legitimate expectation of privacy. A citizen who becomes a State employee does not — and may not be compelled to — give up his or her constitutional rights as the price of gaining that employment. Keyishian v. Board of Regents, 385 U.S. 589, 606 (1967). '[T]he government may not condition government employment upon compliance with unconstitutional conditions.' Shuman v. City of Philadelphia, 470 F. Supp. 449, 457 (E.D. Pa. 1979).

71 Op. Att'y Gen. 8 (1986). *See also infra* note 102.

Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F.2d 1264 (7th Cir. 1976), appears to hold broadly that workers have no reasonable expectation of privacy to refuse blood and urine testing. Yet, the actual rules under review in that case involved testing only after a bus driver had been "involved in 'any serious accident,' or [was] suspected of being intoxicated or under the influence of any narcotics." *Id.* at 1266. Thus, despite the broad language used by the court, the actual issue appears to be not the applicability of the fourth amendment but rather the reasonableness of the conduct. It should be noted that the testing approved in the case was not random or mass testing but was testing based upon particular suspicion of drug intoxication.

68. If the subjective prong of the test means no more than this, then the fourth amendment is reduced to a nullity. Merely by announcing its intention to conduct an unlawful search, the activity would be rendered no search at all.

69. Consent, to be effective, must be voluntary. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). To permit the government to find "consent" merely because the employee does not quit or because he seeks employment converts the notion of consent to the status of a legal fiction. It is asserted, rather, that the government is prohibited from demanding that a worker give up his constitutional rights merely because he seeks or holds government employment. Thus, the employee can require the government not to require him to agree to something it has no right to demand from him in the first place. "But if the choice to decline the search carries with it significant adverse conse-

volved is not pervasively regulated.[70]

2. *Is Drug Testing A Seizure Under Modern Theory?*

Two possible seizures exist in the drug testing situation. The first is a seizure of the person and the second is a seizure of the sample.

The employee is not merely requested to give a sample, he is ordered to do so and at a particular time and place of the employer's choosing. Although an employee may be "free to leave," he or she is made aware of the serious penalties exacted by the government (the loss of the job). Thus, when the employee does not leave, it is not because of a voluntary choice to stay but rather out of fear of the consequences which the government will impose.[71]

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quences, then the alternative — submitting to the search — does not reflect voluntary consent." 71 Op. Att'y Gen. 17 (1986). Sachs quotes from Professor LaFave's treatise, a passage worth repeating to the same point:

> Consent, "in any meaningful sense," cannot be said to exist merely because a person (a) knows that an official intrusion into his privacy is contemplated if he does a certain thing, and then (b) proceeds to do that thing. Were it otherwise, the police would utilize the implied consent theory to subject everyone on the streets after 11 p.m. to a search merely by making public announcements in the press, radio and television that such searches would be undertaken.

2 LAFAVE, *supra* note 18 § 8.2, at 677 (1978) (footnotes omitted). *See also infra* note 102.

70. In Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.), *cert. denied*, 107 S. Ct. 577 (1986), the court upheld random drug testing of jockeys. The court found that horseracing was a pervasively regulated industry which reduced the reasonable expectation of privacy of those engaging in it and made a random testing program reasonable. Significantly, even here, the court did not dispute that the fourth amendment applied to the conduct, but rather held that the administrative search doctrine applied and upheld the procedure as reasonable. *Id.* at 1142. There is no similar reduction in one's reasonable expectation of privacy merely because one is employed by the government.

By contrast, in Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986), the court rejected analogies to testing of military personnel, prisoners, or those engaged in particularly hazardous work and held that a school bus attendant could not be tested absent "particularized probable cause." *Id.* at 1509.

Compare generally Donovan v. Dewey, 452 U. 594 (1981) and United States v. Biswell, 406 U.S. 311 (1972) *with* Marshall v. Barlow's Inc., 436 U.S. 307 (1978).

71. The employee is, in general, subject to the control of the employer. It might be argued, therefore, that no seizure of the person can take place because the employee has a pre-existing obligation to the employer. While this would certainly be true for all activities within the scope of the job, it cannot be a blanket principle applicable no

Threats of consequences less than serious bodily harm might not be sufficient to win a civil action for false imprisonment.[72] However, as the Supreme Court has reminded us in recent years, such external legal standards are not coextensive with the scope of the fourth amendment.[73] A threat of job loss is a serious one. In the context of drug testing it is clear that the one making the threat has the ways and means to carry it out. In such a situation, it should not matter that the employee could physically leave without physical violence.

The second possible seizure involves the sample itself. There is no doubt that the sample passes from the individual to the government, and that the individual loses further control over it. The argument will be made that there is no seizure because the sample is given by the employee rather than taken by the government agent. Here again, the issue of voluntariness is crucial. The sample is given only upon a threat of sanction. If the employee urinated into a bottle on his own and the government then entered the room and physically took the bottle over the most feeble of protests, clearly a seizure would have taken place.[74]

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matter how demeaning or dangerous an employer's demands might be. When the governmental employee is required to go to a particular place to engage in demeaning probings into his most private places, it would not be unreasonable to suggest that the employee be considered seized. In the final analysis, however, whether drug testing will be found to be a seizure of the person is likely to rest on whether drug testing is found to be an acceptable part of everyday work place activity.

72. RESTATEMENT (SECOND) OF TORTS § 40A (1965) states that a civil action for false imprisonment can be based upon duress other than by physical force "where such duress is sufficient to make the consent given ineffective to bar the action." Section 892B states that "Consent is not effective if it is given under duress." The comment to the section, while acknowledging that the cases have rested on such things as threats of physical force against persons and property, notes "The cases, however, do not indicate that these are the limits of the duress that will render consent ineffective." RESTATEMENT (SECOND) TORTS § 892B, comment j. While tort principles do not control the fourth amendment, *see, e.g.*, Oliver v. United States, 466 U.S. 170 (1984), standards external to the fourth amendment can be useful guides in helping to articulate the meaning of its standards, *see, e.g.*, Rakas v. Illinois, 439 U.S. 128 (1978). Consent to search must be voluntary. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). To be "voluntary," consent must not be the product of "duress or coercion, express or implied." *Id.* at 227. The consent must be the "product of an essentially free and unconstrained choice by the maker," *id.* at 225 (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)) as opposed to a situation where the "will was overborne." *Schneckloth*, 412 U.S. at 226.

73. *Oliver*, 466 U.S. at 170; Dow Chem. Co. v. United States, 106 S. Ct. 1819 (1986).

74. A seizure takes place when there is any significant interference with one's

It should not matter that the government is able to coerce the employee into handing over the evidence by threats of much more severe sanctions for failing to do so.[75]

If any one of the possible searches and seizures suggested here exist, then the activity is within the ambit of the fourth amendment and will be struck down unless found to be reasonable. If the initial seizure of the person is unreasonable then forcing the sample from him is a fruit of that poisonous tree. The same result is manifested if requiring the sample to be produced amounts to a search. Finally, if handing over the sample is itself an unreasonable seizure, then the government has no right to it and the results obtained by the test are fruits of that seizure.

3. *Private Search/Government Action*

Conduct performed by private individuals rather than by the government is not a search or seizure.[76] Yet, it is also true that a private person may become a government agent when the search or seizure is made at the urging or command of the government.[77]

Thus, in *Schmerber v. California*,[78] the extraction of blood from

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possessory interest in an item. United States v. Jacobsen, 446 U.S. 380 (1984). In drug testing, the sample is removed from the employee's control and custody and subjected to tests designed to reveal private information about the employee. A seizure would seem to have taken place in this situation.

75. Urine, unlike blood, is routinely discharged from the body, so no governmental intrusion into the body is required to seize urine. However, urine is discharged and disposed of under circumstances where the person certainly has a reasonable and legitimate expectation of privacy. One does not reasonably expect to discharge urine under circumstances making it available to others to collect and analyze in order to discover the personal physiological secrets it holds, except as part of a medical examination. It is significant that both blood and urine can be analyzed in a medical laboratory to discover numerous physiological facts about the person from whom it came, including but hardly limited to recent ingestion of alcohol or drugs. One clearly has a reasonable expectation of privacy in such personal information contained in his bodily fluids. Therefore, governmental taking of a urine specimen is a seizure within the meaning of the Fourth Amendment. *McDonell*, 612 F. Supp. at 1127.

76. United States v. Jacobsen, 446 U.S. 380 (1984).

77. *E.g.*, Schmerber v. California, 384 U.S. 757 (1966).

78. *Id.*

the petitioner by doctors at the hospital was a search[79] because the doctors acted under the direction of the police. The case suggests that when the private person becomes an instrument of the government, the search has ceased to be private. The cases upholding private searches are consistent with this view.[80]

In *Schmerber*, if the police threatened the doctors with sanctions if they refused to take the sample, clearly the search would not be private. In fact, the mere fact that the blood was taken by the doctors under the "direction" of the police was sufficient to make the extraction governmental activity. Why then should it be any different if the police compelled a person to take the sample himself by directly threatening him. Commanding a doctor to use a needle on a person would be considered a government search. A command to the same person to use a needle on himself ought no less to be considered a government search. The result should be no different if it is a compelled urine sample that is obtained. Essentially, this is the point that *Boyd* made so many years ago. In *Boyd*, the government had managed to transform a person *himself*, into a government agent. In the case of compelled drug testing, not only should the employee be viewed as a compelled governmental agent, but the taking of the sample should be viewed as governmental activity no less than if the compulsion was applied to a third party.

C. *Summary: Search and Seizure*

Under any one of several theories, mandatory drug testing by a government employer is a search and/or seizure. It fits the theory articulated in *Boyd*. It is consistent with the theoretical requirements of *Katz*. It is distinguishable from the private search situation.[81]

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79. "Compulsory administration of a blood test . . . plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment." *Schmerber*, 384 U.S. at 767.

80. *See, e.g., Jacobsen*, 446 U.S. at 380.

81.

> While we recognize the importance of government's attempts to curb drug abuse, we are concerned that indiscriminate drug testing threatens traditional fourth amendment values. More perhaps than any other provision of the Bill of Rights, the fourth amendment expresses an essential quality of democracy — the defense of personal dignity against violation by the state. We ought not experiment with these rights. They are fragile. Once damaged they are not easily repaired. Once lost they are not easily recovered.
>
> Adherence to tested Fourth Amendment principles is particularly im-

III. When is Drug Testing "Reasonable"?

The fact that drug testing amounts to a search and/or seizure does not end the inquiry as to its constitutionality. The reasonableness of drug testing must be evaluated.[82]

There are many ways to approach the issue of reasonableness. Although some will debate fine lines of difference, for practical purposes, the real debate is between those who argue that mandatory drug testing is constitutional on a per se basis (either through blanket testing of all employees or through random testing of a portion of the work force) and those who argue that testing an employee is unconstitutional unless there is some level of individualized suspicion (either probable cause or reasonable suspicion) that the particular employee is impaired on the job due to drug intoxication.

In general, reasonableness is a matter of balancing the need of the government to intrude and the degree of that intrusion.[83] When a warrant is required, only probable cause will support its issuance.[84] Even when a warrant is not required, most searches for evidence still require probable cause.[85] Recently, in some limited situations, searches have

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portant when, as now, there is widespread clamor for a simple solution to a serious social problem. The saddest episodes in American constitutional history have been those occasions, like the internment of Americans of Japanese descent during World War II, when we have bent our principles to the zealotry of the moment. A war on drugs is a good idea, but not if its first casualty is the Bill of Rights.

71 Op. Att'y Gen. 4-5 [Maryland] (1986).

82. U.S. CONST. amend. IV. "For what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures." Terry v. Ohio, 392 U.S. 1, 9 (1968) (quoting Elkins v. United States, 364 U.S. 206, 222 (1960).

83.

> In order to assess the reasonableness of Officer McFadden's conduct as a general proposition, it is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.

Terry v. Ohio, 392 U.S. 1, 20-21 (1968) (quoting Camara v. Municipal Court, 387 U.S. 523, 534-35, 536-37 (1967).

84. U.S. CONST. amend. IV. "If this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether 'probable cause' existed to justify the search and seizure which took place." *Terry*, 392 U.S. at 20.

85. "Ordinarily, a search — even one that may permissibly be carried out with-

been permitted with less than probable cause.[86] The cases which have approved these searches involved situations in which special factors existed. These special factors either greatly increased the government's need to search beyond the normal interest in crime prevention; or greatly lessened the degree of intrusion due to the limited nature of the search; or involved a situation in which the normal reasonable expectation or privacy was greatly reduced.[87] On rare occasions, a combination of these factors has resulted in a search (or seizure) being permitted on a per-se basis.[88]

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out a warrant — must be based upon 'probable cause' to believe that a violation of the law has occurred. *See, e.g.*, Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973); Sibron v. New York, 392 U.S. 40, 62-66 (1968)." New Jersey v. T.L.O., 469 U.S. 325, 334 (1985).

86. *T.L.O.*, 469 U.S. at 325; United States v. Montoya de Hernandez, 105 S. Ct. 3304 (1985).

87. In *T.L.O.*, for example, the Supreme Court held that the fourth amendment applied to searches of school children by public school officials. Yet, the Court also recognized that the particular difficulty in maintaining order in schools, the need to closely supervise children to create the proper educational environment; and the importance of an informal teacher-student relationship. These factors justified dispensing with both the warrant requirement and the probable cause standard in favor of a lesser "reasonable suspicion" standard. "Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard." *T.L.O.*, 469 U.S. at 341.

In *Montoya De Hernandez*, the Court noted the special power of a nation to control its borders and the resulting diminution of the reasonable expectation of privacy entailed by this right, and upheld routine border seizures and searches at will, and much more intrusive ones on a "reasonable suspicion" standard. *Montoya De Hernandez*, 105 S. Ct. at 3311.

88. In United States v. Villamonte-Marquez, 462 U.S. 579 (1983), the Supreme Court upheld the right of customs agents acting under statutory authorization to seize, board, and conduct a limited search of the ship's documents without any requirement of individualized suspicion. The Court stressed a series of reasons for the decision: The fact that similar statutes had been enacted by the First Congress (which also proposed the fourth amendment), the scope of the intrusion was limited and carefully tailored to serving the governmental interest in preventing smuggling, the impracticability in a water setting of establishing fixed check points at which all traffic would be stopped, etc. In an earlier case, Delaware v. Prouse, 440 U.S. 648 (1979), the Court struck down random vehicle stops away from the international border to check license and registration but, in *dicta*, indicated that a fixed check point would be constitutionally permissible. The reasons included the pervasive regulation of the automobile, the important interest in highway safety, and the limited nature of the intrusion, which involved merely a check of the drivers license and registration documentation.

A. *The Need to Intrude*

The government, like any other employer, has a legitimate interest in the job performance of its workers. Therefore, it has the right to prescribe reasonable rules and take reasonable steps to eliminate job impairment regardless of the cause. Although other factors besides the use of illegal drugs effect job performance (abuse of alcohol; illness; stress; marital problems; etc.), drug use on the job is a cause of job impairment and so falls within the realm of legitimate employer concern.

This is not to say, however, that an exaggerated government interest can be created, and drug testing approved, with a few generalized comments about the extent of drug abuse in our society and the need for corrective action. Not only might other problems in our society be similarly described,[89] but the scope of the employer's concern about

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89. The problems of drunken driving, missing and abused children, and illegal hand guns come readily to mind. Although everyone agrees that drug use on the job is a problem which society must face, courts should be slow to accept without data or to take "judicial notice" of the level or seriousness of the problem. Assumptions based upon newspaper headlines may mean merely that a problem has begun to occupy the national attention and may not indicate the true level of its danger. Similar national attention was focused upon airline hijackings in the 1960's and 1970's. This has led to widespread acceptance of searches of airline passengers. It could not be disputed that airline hijackings were and continue to be a problem. Extensive coverage of a relatively small number of such incidents, however, may have created a climate of fear very similar to that being created about drug abuse on the job today. Without doubt, reasonable anti-hijacking measures were appropriate. Yet, the extreme reaction of mass searches may well have been an over-reaction to the problem. In a 1974 article which collected and evaluated data from 144 hijackings since 1961, the author was led by the data to state "hijacking has been among the least dangerous or costly of all crimes in America in the percentage of incidents resulting in injury or death to a victim, in the percentage of all victims injured or killed, and in the risk or injury which the crime poses for travelers." Andrews, *Screening Travelers at the Airport to Prevent Hijacking: A New Challenge for the Unconstitutional Conditions Doctrine*, 16 ARIZ. L. R. 657, 698 (1974). The data analyzed by Professor Andrews revealed that for the period 1961-1972, an airline traveler had "only a 1 in 325 million chance of being killed in a hijacking," while the chance of being murdered due to crime generally in 1972 was "1 in 11,236." *Id.* at 744. Yet, searches and seizures to prevent hijackings have been accepted which would certainly not be accepted if applied throughout society to stop murder generally. Similarly, when government argues for sweeping new powers to search and seize by drug testing workers, courts should demand exacting proof concerning the actual level of danger and the resulting need to intrude. Sweeping generalizations and a small number of well publicized incidents of drug related injuries should not substitute for carefully conducted research, and courts should be very slow to cir-

drug use is only the extent to which it impairs job performance.[90]

At present, the most commonly used drug tests do not measure current drug intoxication, let alone the degree of impairment.[91] Rather, the commonly used tests discover the presence of metabolites of various drugs. These are the residues of drugs existing after the actual active agent of the drug has been processed by the body.[92] Metabolites are not, themselves, evidence of current intoxication. However, they often remain in the body for days or even weeks after the ingestion of the drug.[93] In sharp contrast to the blood alcohol test used in *Schmerber v. California*,[94] which measured the actual blood alcohol content in the

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cumvent the need for empirical proof by taking notice not only that a problem exists but that it is as serious as the government claims, but does not prove, that it is.

90. Although this author doubts the possibility that such a person could exist, the hypothetical situation of an employee who, although intoxicated by drugs, managed to perform his job *as well as* a non-intoxicated person and did not act as a distribution point for others seeking drugs (thus posing no danger to others and not resulting in defective job performance) would not fall within the scope of legitimate employer concern. The employer's legitimate concern about drug use is based not upon personal disapproval of drug use, but upon the disruption and danger caused by their use on the job. *See* Osterman v. Paulk, 387 F. Supp. 669 (S.D. Fla. 1974) (due process violation found in polygraph testing because marijuana use sometime within the prior six months was not rationally related to qualifications as a clerk).

91. Comment, *Your Urine or Your Job: Is Private Employee Drug Urinalysis Constitutional in California?*, 19 LOY. L.A.L. REV. 1451 (1986) [hereinafter cited as *Your Urine*]. The comment quotes extensively from material produced by Syva, the company which manufactures the popular "Emit" test, and notes that the test "does not determine the concentration of THC in one's body." *Id.* at 1456. It quotes from the Syva report to the effect that the test is "useful only as an indicator of recent use of marijuana and *not* as a measure of intoxication." *Id.* at 1458 (quoting Syva Company, Marijuana and the Emit Cannabinoid Assay (June 1981)). The author also cited a confirming telephone conversation with Ann Burton, from Syva, "[s]he specifically confirmed that the urine tests do not and are not expected to measure intoxication at the time of testing." *Id.* at 1457 n.40.

92. "Metabolites can be detected in the urine long after the impairment, or the 'high,' from the marijuana has ceased." *Id.* at 1456-57.

93. *Id.* at 1457 n.39, notes that the presence of metabolites of THC (the active ingredient in marijuana) may show up in testing more than thirty days after ingestion.

> Certain drugs metabolize more quickly than others. Alcohol is flushed out of the body within 12 hours, and cocaine within two or three days, while marijuana can be detected a couple of months after it was used. There is even an instance in which marijuana was detected 81 days after it was used, according to Professor Dubowski.

Stille, *Drug Testing: The Scene is Set for a Dramatic Legal Collision Between the Rights of Employers and Workers*, Nat'l L.J., Apr. 7, 1986, at 1, 24.

94. 384 U.S. 757 (1966).

blood, most drug tests do not show present intoxication or its level. Moreover, blood alcohol levels need to be tested quickly to show its presence whereas with drug testing what is tested does not quickly leave the body.

These facts lessen the intensity of the government's claim of its need to test. The test does not confirm what the employer really needs to know (present intoxication and level of intoxication) and there is no test-taking exigency.

Although the government will argue that there is some connection between drug use off the job and drug use on the job, the burden is on the government to prove the degree of such correlation. Absent such a showing, the discovery of "free time" drug use without more (for example, the employee used marijuana two weeks ago during a mountain vacation camping trip) is irrelevant or at most only slightly relevant to the employer's interst in a non-impaired worker.[95]

This problem can be analogized to the fourth amendment warrant requirement of "particularity."[96] For an employer to obtain a warrant to test an employee believed to be using drugs on the job, the evidence to be searched for would be "current intoxication." Furthermore, the search would have to be tailored to discover that information. Since drug testing, as commonly performed today, does not reveal current intoxication, it would be beyond the scope of the warrant. This is because the search would not be reasonably calculated to discover evidence of current intoxication.

It may well be that there is some degree of correlation between those who use drugs off the job and those who use them on the job. Again, it is the government's task to demonstrate the degree of correlation. Unless the correlation is shown to be very high, the government interest in knowing who uses drugs off the job, while perhaps not wholly irrelevant to the primary government interest in job impairment,

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95.

> We would be appalled at the spectre of the police spying on employees during their free time and then reporting their activities to their employers. Drug testing is a form of surveillance, albeit a technological one. Nonetheless, it reports on a person's off-duty activities just as surely as someone had been present and watching. It is George Orwell's 'Big Brother' society come to life.

Capua v. City of Plainfield, 643 F. Supp. 1507, 1511 (D.N.J. 1986), striking down a city attempt to institute mass drug testing of city fire fighters. *See generally Osterman*, 387 F. Supp. at 669.

96. U.S. CONST. amend. IV.

is still much reduced.

The government's interest is also reduced because commonly used tests have not yet been proved to be accurate. Although the details of the problems with the test are beyond the scope of this article, they include false positives and cross-reactivity.[97] Data challenging the accuracy of the test decreases the government's legitimate interest in using it since the chance that its use will accurately reveal relevant information is thereby reduced.

Other methods to spot impairment are available. These include training supervisors to recognize signs of such impairment, basic eye-hand coordination tests, etc.[98] This also lessens the governmental interest in using the particular search technique of drug testing. This is not to say that all such impairment would necessarily be found by such techniques. However, it is at least directed toward discovering the present state of the employee rather than his/her past acts or prior state.

If a test is eventually discovered which measured current drug intoxication only, the government interest in using such a test would be greater. It would probably be agreed by most that an employer has an interest in job performance and any factor which interferes with this is of some concern to the employer. The level of concern would depend to some degree on the nature of the work. When the work involves immediate risks to public safety, and when the drug use in question is likely to lessen the ability to do the job, the interest is higher. When the job does not involve public safety, the interest is still present (the interest in good work performance) but it is less.

Even here, however, it would be questionable whether the govern-

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97. The problem is particularly acute when proper follow-up testing of initial Emit positives is not performed. It has also been reported that a wide variety of over the counter medications and some foods can cause a positive reading. Error rate estimates vary widely from 5% or less by the company or 25% or more by some medical people. A good review of the issue is provided in *Your Urine*, *supra* note 91, at 1455-61. Laboratory tests may be as bad or worse. *See* Hansen, Caudill, & Boone, *Crisis in Drug Testing: Results of CDC Blind Study*, 253 J. A.M.A. 2382 (1985), *reprinted* in 10 CHAMPION: OFFICIAL J. OF THE NAT'L A. OF CRIM. DEF. LAW. 20 (Jan./Feb. 1986).

98.

> The threat posed by the widespread use of drugs is real and the need to combat it manifest. But it is important not to permit fear and panic to overcome our fundamental principles and protections. A combination of interdiction, education, treatment and supply eradication will serve to reduce the scourge of drugs, but even a reduction in the use of drugs is not worth a reduction in our most cherished constitutional rights.

Capua, 643 F. Supp. at 1522.

mental interest involved is any higher than that of crime prevention generally. If police want to search for 100 pounds of a particular drug, probable cause and a warrant will generally be required. This is true even though the sale of the drug on the street will involve a certain number of deaths from overdoses, thefts to pay for the drug, and some drug use on the job. Yet, when only part of these results are at issue (the intoxication of some workers) the government asserts a higher interest allowing a search on less than probable cause and without a warrant. There is a logical incongruity here which has not yet been fully realized in the case law.

In summary, a governmental employer has a legitimate interest in discovering and eliminating job impairment including that caused by the ingestion of drugs on the job. The interest in discovering off duty drug use is either non-existent or significantly less. Tests commonly in use today do not test for current intoxication but actually reveal only drug use within a certain time in the past which may be days or weeks. The government interest in drug testing workers does not, therefore, appear to be compelling. It may or may not be as significant as the general governmental interest in crime prevention, depending on the test, but it will not be more than that crime prevention interest.

B. *The Degree of Intrusion*

Drug testing is very intrusive.[99] Earlier in this article, this intrusiveness was used to measure the reasonableness of the employee's privacy expectation, but many of those factors are also relevant here. Testing is deeply intrusive and humiliating. It requires an employee to convert a traditional private activity involving the intimate use of the body into a public one, often observed by an employment supervisor. It requires that one's bodily fluids be turned over to the control of the government for analysis. It provides an opportunity for an employer to ascertain many private facts about the employee beyond mere drug use.[100]

Mass testing is also intrusive because it treats presumptively innocent people as though they were guilty of drug use and requires them to *prove* their innocence by taking the test. When mass drug testing is

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99. *Id.* at 1514. The Court of Appeal for the 8th Circuit, in McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987), takes the opposite view without a thorough analysis of the issues involved.

100. *See supra* notes 56 to 59 and accompanying text.

implemented, employees are required to submit to the test even though there is no reason to believe that they are or have been taking drugs. The habit of treating innocent citizens as if they were guilty will only serve to destroy the free society which we now enjoy.

> If we choose to violate the rights of the innocent in order to discover and act against the guilty, then we will have transformed our country into a police state and abandoned one of the fundamental tenets of our free society. In order to win the war against drugs, we must not sacrifice the life of the Constitution in the battle.[101]

C. *Rejecting False Analogies*

Those arguing for random or blanket testing without any requirement of individualized suspicion will point to two other situations where searches and seizures are allowed on that basis. On closer analysis, however, both analogies turn out to be false.

It is true that passengers boarding commercial air carriers in American cities are subject, on a blanket basis, to two types of searches, first an X-ray examination of carry-on luggage and secondly a metal detector scan of the person. Does this fact give authority for blanket drug testing of workers? The answer appears to be "no."

While it can be argued that the airport searches are closely linked to the asserted governmental interest, that is, to lessen the chance of airline hijacking by discovering those who are carrying weapons aboard airplanes. It must be remembered that the analogous governmental interest in the employment situation is the discovery of workers who are impaired *on the job* due to drugs. Drug testing, however, does not reveal only those who are under the influence of drugs at the time of the test but rather whether the individual has consumed drugs at some time in the past, a time-frame often days or weeks long. The true analogy would be to ask whether, on a blanket basis with no individualized suspicion, an airline passenger could be subjected to a search which revealed whether the passenger had handled a weapon within the last two weeks but not whether the weapon was currently in the possession of the passenger? The answer would be "no," because despite a high governmental interest, the proposed search and seizure would not be

101. *Capua*, 643 F. Supp. at 1522.

narrowly tailored to accomplishing the goal.[102] This would make it

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102.

> With reference to air traveler screening, the first absolute can be expressed by a restatement of two well-known epigrams: an air traveler may have a constitutional right to be free from unreasonable searches and seizures, but he has no right to travel by air, and air travelers may board airplanes upon the reasonable terms laid down by the government. If they do not choose to board on such terms, they are at liberty to retain their rights of privacy and travel by other means. However, in a line of cases which now number at least 13, 'the theory that [a benefit] which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.' Even if the benefit may be characterized as a privilege, the government's conditioning power is not absolute.

Andrews, *Screening Travelers at the Airport to Prevent Hijacking: A New Challenge for the Unconstitutional Conditions Doctrine*, 16 ARIZ. L. REV. 657, 668 (1974) (footnotes omitted).

Professor Andrews argues that the doctrine of unconstitutional conditions provides the proper approach to the airport question and stresses that the balancing of interests involved requires that the "least drastic means" be used to meet the governmental interest. Thus, by analogy, the overbroad nature of drug testing, as discussed previously in this article, seriously undercuts the claim of reasonableness asserted by the government employer.

> This least drastic means is the most selective system that can be constructed from available procedures. Such a system would use a large number of screening procedures arranged from the most minimally intrusive to the full search. This model system would effectively protect air travel from the dangers of hijacking with the least possible impact on the rights of air travelers. It would spare the vast majority any contact with even the mildest of the procedures amounting to a search.

Id. at 739.

In the present context, this approach would include training supervisors to recognize impaired behavior, education, and testing when circumstances indicated reason to believe that a particular employee was drug impaired. It would not permit bypassing all less intrusive measures and jumping directly to mass or random testing of employees. *See generally* Keyishian v. Board of Regents, 385 U.S. 589 (1967), Pickering v. Board of Educ., 391 U.S. 563 (1968); Connick v. Myers, 461 U.S. 138 (1983); and NOWAK, ROTUNDA, & YOUNG, CONSTITUTIONAL LAW 960-73 (2d ed. 1983). It is suggested that the older view, that because public employment was not a right it could be conditioned in any way the government desired including the abandonment of any and all constitutional rights, has been effectively repudiated and a more delicate balancing approach approved.

> For at least fifteen years, it has been settled that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression. . . . Our task, as we defined it in *Pickering*, is to seek 'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the inter-

unacceptably intrusive.[103] So it is with drug testing.

Even those who accept the constitutionality of the airport searches[104] should be able to see that the parallel is fatally flawed. For

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> est of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'

Connick, 461 U.S. at 142.

> Where the Court finds or assumes that a condition does affect a right, it may hold the condition unconstitutional solely on the ground that it is irrelevant, but without articulating such a strict test of irrelevance. In either case, the lack of relevance will render a condition unconstitutional at the outset. When some minimal relevance is found, however, the analysis proceeds to an assessment of the extent of the condition's effect, if any, on constitutional rights and the availability of less drastic means to protect the benefit. . . . Most decisive under the unconstitutional conditions doctrine is the requirement that a condition that infringes on a right be held unconstitutional if there is a less drastic means to achieve the same purpose.

Andrews, *supra* note 89, at 670-71 (footnotes omitted).

103. Professor Andrews argues that the unconstitutional conditions doctrine is an appropriate one for some fourth amendment situations and can help in gaining an analytical understanding of fourth amendment cases concerning pervasively regulated industries, border searches, and administrative searches. Often these cases involve situations in which the normal right to privacy has been previously reduced (something which is present in the pervasively regulated industry and border situation but cannot be said to be present merely because an individual becomes an employee). The lack of other effective means to meet the governmental interest has also been important. "In *Camara*, the Court said: 'There is unanimous agreement among those familiar with this field that the only *effective* way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all structures.' " Andrews, *supra* note 89, at 686 (footnote omitted and emphasis added by Andrews) (quoting in part, Camara v. Municipal Court, 387 U.S. 523, 535-36 (1967)). By contrast, there is considerable debate about the need to drug test and alternative measures have not fully been explored.

104. A number of commentators, while seeming to accept the need for anti-hijacking measures, expressed concern about the broad scope of the screening program. "If the airport security system is to maintain its validity, the principle espoused in this decision [Sibron v. New York, 392 U.S. 40 (1968)] must be applied with vigor and determination and the airport security system should be firmly re-directed to the accomplishment of the end for which it was created." Note, *Airport Security Systems and the Fourth Amendment*, 35 LA. L. REV. 860, 867 (1974). "Certainly aircraft hijackings endanger the public, but so do murder, rape, and armed robbery. The same reasoning that upholds warrantless magnetometer and carry on baggage searches could also support the installation of magnetometers on street corners in high crime areas." Cooke, *Airport Security Searches: A Rationale*, 2 AM. J. CRIM. LAW 128, 144 (1973) (footnote omitted). "The use of the system for fishing expeditions would be especially abusive in view of the vast number of citizens to which it is applied." Note, *The Con-*

others, who find the constitutional defense of airport searches dubious, it should be clear that such questionable practices should not be further extended.[105]

A second faulty analogy is to compare drug testing to the automobile roadblock situation which permits stopping all cars to check for license and registration without individualized suspicion. The doctrine comes from Supreme Court dicta in *Delaware v. Prouse*.[106]

Prouse actually dealt with stops of automobiles by mobile police units, and in the absence of individualized suspicion.[107] The practice was declared unconstitutional.[108] In dicta, the Court stated that a roadblack at which all cars were stopped could be acceptable for this purpose.[109]

The dicta in *Prouse* is not closely analogous to drug testing. Arguably, it had two analytical bases, neither of which are well suited to the drug testing situation. First, the dicta would appear to rest, at least in part, upon a reduced expectation of privacy while in an automo-

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stituonality of Airport Searches, 72 MICH. L. REV. 128, 155-56 (1973). The author seems to approve of the establishment (probably by legislation) of a special exclusionary rule whereby evidence not connected to hijacking would be excluded from any subsequent criminal prosecution. The same proposal appears in Note, *Airport Searches and the Rights to Travel: Some Constitutional Questions*, 23 CLEV. ST. L. REV. 90, 108 (1974).

105. Searches of airline passengers began as a non-random process. Only those who met a "hijacker profile" were required to submit to metal detection and only those who triggered the metal detector were searched further. The mass search system was instituted in 1973. *See generally*, Comment, *The Airport Search and the Fourth Amendment: Reconciling the Theories and Practice*, 7 UCLA L. REV. 307 (1978).

> Anti-hijack searches have led to a large number of arrests at American airports: 6225 under the old Profile system, and more than 1300 in the first six months of the new system. Of the arrests made under the old system, fewer than 20% were for hijacking-related charges. More than 30% were for possession of drugs. As one judge noted: 'It is passing strange that most of these airport searches find narcotics and not bombs."

Note, *Airport Searches: Fourth Amendment Anomalies*, 48 N.Y.U. L. REV. 1043, 1046 (1973) (footnotes omitted and partially quoting United States v. Legato, 480 F.2d 408, 414 (5th Cir. 1973) (Goldberg, J., concurring)).

106. 440 U.S. 648 (1979).

107. *Id.* at 650-51.

108. *Id.* at 663.

109. "This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative." *Id.*

bile,[110] based both upon the uses to which automobiles are traditionally put and the extensive web of governmental regulation surrounding their use.[111] Secondly, the dicta is within the context of the minimal nature of the intrusion,[112] and the close connection between the small intrusion and the interests furthered by the regulation. The brief stop of each auto was only to examine those very documents required to be carried due to the extensive regulation.[113]

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110. *Contrast* Carroll v. United States, 267 U.S. 132 (1925) and California v. Carney, 105 S. Ct. 2066 (1985) in which the Court stated:

> However, although ready mobility alone was perhaps the original justification for the vehicle exception, our later cases have made clear that ready mobility is not the only basis for the exception. The reasons for the vehicle exception, we have said, are twofold. "Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office,"

Id. (citations omitted) *with* United States v. Chadwick, 433 U.S. 1 (1977).

111. "These reduced expectations of privacy derive not from the fact that the area to be searched is in plain view, but from the pervasive regulation of vehicles capable of traveling on the public highways." *Carney*, 105 S. Ct. at 2609.

112. The lack of discretion on the part of the officer and the resulting lessening in "subjective intrusion — the generating of concern or even fright on the part of lawful travelers — is appreciably less in the case of a checkpoint stop." United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976), *quoted in* Delaware v. Prouse, 440 U.S. 648, 656 (1978). This factor provides the only point of analogy to blanket drug testing. Yet, the level of intrusion justified by this factor was, factually, minimal, extending only to documents issued by the government and which drivers are required to carry. No search of the interior of the car is justified by such a checkpoint stop absent individualized suspicion or consent. United States v. Ortiz, 442 U.S. 891 (1975). Thus, the analogy to *Prouse* would not support a *search* of the person for anything as intimate as bodily fluids.

113. The rationale of the *Prouse* dicta has been extended in some states beyond the check for license and registration to *sobriety* checkpoints for drunk drivers. This extension to criminal drunk driving investigations is itself questionable and has had a mixed reaction. *See generally* Rogers, *The Drunk-Driving Roadblock: Random Seizure or Minimal Intrusion*, 21 CRIM. L. BULL. 197 (1984). Yet, even as extended by some courts, the use of roadblocks is limited to vehicles in which the expectation of privacy is reduced. Further, the stop entails only brief observation by the officer. No further search would be permissible unless the observations by the officers give rise to reason to believe that the driver is intoxicated. In the work place, the same observation can be conducted without any seizure of the person, with drug testing reserved for workers whose actions give rise to individualized suspicion of drug induced work impairment. Sobriety checkpoints do not give strong support for work place drug testing. *Prouse* cannot be read for the proposition that *any* intrusion no matter how intrusive is permitted as long as the government imposes the same intrusion on everybody.

By contrast, workers do not seriously reduce their reasonable expectation of privacy in their own bodies merely by accepting employment, there is no analogous history of pervasive government regulation, and the search sought to be made, an extraction of bodily fluids, is much more invasive of privacy than the inspection of documents issued by the government itself.

The conclusion logically following from a comparison of the drug testing situation and that of airport searches and automobile document checkpoints is that the latter two situations do not provide support for random or blanket drug testing.

D. *Summary: Reasonableness*

The above discussion demonstrates that work place drug testing is very intrusive upon the legitimate privacy expectation of workers in their persons. The governmental interest, while not non-existent, is usually not higher than that in crime prevention generally. To the extent that a higher or more pressing interest is asserted, it is balanced by the over intrusiveness of the proposed testing process, a process that is not narrowly designed to search only for current drug use, and so becomes only marginally related to the governmental interest in preventing worker intoxication on the job. Analogies to approved blanket/random checkpoint situations are very weak. Thus, drug testing is not reasonable absent some degree of individualized suspicion of work place drug impairment. Random or blanket testing is unreasonable under the fourth amendment.

IV. Conclusion

Drug testing is a search (and arguably a seizure) subject to the limitations of the fourth amendment. Such testing cannot be justified (it is unreasonable) absent some level of individualized suspicion (reasonable suspicion or probable cause) of drug induced job impairment.[114]

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114. The first wave of drug testing cases has been decided at the district court level and a few have worked their way up to the courts of appeal. In general, the cases find drug testing to be a search and to require some degree of individualized suspicion before a test is permitted. The courts seem to be settling on a standard less than probable cause (reasonable suspicion) after balancing the various interests involved. Most of the decisions recognize the serious nature of the intrusion that drug testing entails and most reject the notion that a public employee can be required to check his constitu-

tional rights at the door upon entering into the employment relationship. Yet, the courts are also deciding that the government, as employer, has a legitimate interest in maintaining a work place free of drug impaired workers and that the problem is a serious one. The balancing of these factors has led to the lesser standard of suspicion for drug testing. A few cases have upheld blanket or random testing but these cases seem to be limited, in general, to narrow factual contexts in which governmental interests are particularly strong and privacy expectations are already reduced. These cases, involving pervasively regulated industries and prisons are, at present, the exception rather than the rule. To date, general claims that particular categories of workers must be randomly tested because they deal with the public or are involved in occupations involving safety (police and fire employees for example) have been properly rejected. General safety concerns, if alone held to be sufficient to uphold random testing, would quickly lead to generalized testing since almost all workers could be said to have some relation to safety or to the public. At the same time, the final verdict is not yet in, and hard fought appeals can be expected by the government. It can also be expected that new categories of workers, from air traffic controllers to railroad engineers will be considered candidates for mass testing programs. A review of some recent cases may prove useful.

In Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986), the city imposed mandatory urinalysis on some of its employees. "On May 26, 1986, all fire fighters and fire officers employed by the defendant City of Plainfield were ordered to submit to a surprise urinalysis test. At 7:00 A.M. on May 26, the Plainfield Fire Chief and Plainfield Director of Public Affairs entered the city fire station, secured and locked all station doors and awakened the fire fighters present on the premises. Each fire department employee was required to submit a urine sample while under the surveillance and supervision of bonded testing agents employed by the city." *Id.* at 1511.

Federal district Judge Sarokin held that taking the sample was a search and seizure, and that the degree of intrusion was "relatively high," that precautions had not been taken to assure confidentiality of the test results, that government employees do not abandon their fourth amendment rights by becoming public employees, that such testing was unreasonable absent "reasonable suspicion," and so violated the fourth amendment. *Id.* at 1507.

Another plan for testing city fire fighters was struck down in Lovvorn v. City of Chattanooga, 647 F. Supp. 875 (E.D. Tenn. 1986). The court noted that "it seems clear that a urine test likewise amounts to a search and seizure from a person within the Fourth Amendment." *Id.* at 879. The litigants did not contest this. The court stated that while a city had "a compelling interest in having its fire fighters free from drugs," the test would be experienced as intrusive by many (even if not by all). *Id.* at 879. While governmental employees may not have a complete right to privacy while on the job, the fourth amendment is still applicable to them. Balancing the competing interests led the court to hold that testing was unreasonable in the absence of "reasonable suspicion." *Id.* at 883.

Less than ten days later, the Reagan administration's plan to require customs workers to undergo drug tests was dealt a serious blow in National Treasury Employees Union v. Von Raab, 649 F. Supp. 380 (E.D. La. 1986). District Judge Robert F. Collins enjoined the program, stating that such testing was a search and seizure and was, in fact, "even more intrusive than a search of a home." *Id.* at 386. The judge noted

that "This dragnet approach, a large-scale program of searches and seizures made without probable cause or even reasonable suspicion, is repugnant to the United States Constitution." *Id.* at 387. It was noted that urine is generally eliminated in circumstances where privacy is expected and that it can be used to determine many private things about the individual. *Id.* The court also held that "consent" to such searches and seizures as a condition for employment was coerced and not voluntary. *Id.* at 387-88. The Court of Appeal for the Fifth Circuit denied a stay of the injunction since oral argument was scheduled within three weeks. National Treasury Employees Union v. Von Raab, 808 F.2d 1057 (5th Cir. 1987). A motion for an expedited appeal was granted and was scheduled for the week of Feb. 2, 1987. National Treasury Employees Union, Acodta (Argent) v. Von Raab, No. Civ. A. 86-3522 (5th Cir., Jan. 21, 1987) (Lexis Genfed Library Ct. File).

The possible trend against blanket or random drug testing was noted recently in an order refusing to dismiss a challenge to a urinalysis program ordered for certain groups of civilian workers for the Department of Defense, and issuing an order temporarily enjoining the program. It was noted in American Fed'n of Gov't Employees (AFL-CIO) v. Weinberger, 651 F. Supp. 726 (S.D. Ga. 1986) that "a judicial trend is finally beginning to emerge clearly, and with each new decision on the subject of periodic drug testing it becomes more apparent that testing of civilians by urinalysis, absent some form of individualized suspicion, is in almost all cases offensive to the mandates of the fourth amendment." *Id.* at 732. The court also labelled arguments that urinalysis was not a search or seizure "entirely untenable." *Id.* This position is also in line with widely cited state cases including City of Palm Bay v. Bauman, 475 So. 2d 1322 (Fla. 5th Dist. Ct. App. 1985), in which the court held that drug testing of police and fire personnel was unreasonable absent reasonable suspicion. *Id.* at 1326. The same result (but called "particularized probable cause") as to bus attendants was had in Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986). Patchogue-Medford Congress of Teachers v. Board of Educ., 119 A.D.2d 35, 505 N.Y.S.2d 888 (App. Div. 1986), agreed as to probationary teachers stating, "We conclude that such compulsory testing constitutes a search within the meaning of the Fourth Amendment to the Constitution of the United States, and that to compel a probationary teacher to undergo such a search without reasonable suspicion that such teacher is, or has ever been, a drug user is unconstitutional." *Id.* at 36, 505 N.Y.S.2d at 889. Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. 1985) upheld testing for police officers after construing the regulation to require reasonable suspicion of drug use.

The cases contra are generally distinguishable. Probably it can be said that the leading case approving random testing is still Shoemaker v. Handel, 795 F.2d 1136 (3d Cir. 1986), which upheld testing of jockeys due to their participation in a pervasively regulated industry.

Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976), an early case which seems out of step with the emerging trend of the cases and which purported to validate an absolute right to test, actually did so in a factual context where regulations permitted testing only when a particular driver was involved in a serious accident or was otherwise suspected by two supervisors of being intoxicated. Although the broad language in the case seems wrong, its limited factual setting allows the case to be harmonized with the emerging requirement of particularized suspicion.

Another case which seems incorrect in theory but explainable on the facts is Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985), a case which held, incorrectly it would seem, in light of New Jersey v. T.L.O., 469 U.S. 325 (1985), that as long as testing is administered by the government as an employer instead of as a law enforcement agency, the test would be reasonable. Factually, however, the case dealt with tests administered only to employees previously identified by an undercover officer as drug users and for whom there was ample reasonable suspicion to test.

Recently, the Court of Appeal for the Eighth Circuit, modified the district court's decision in McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985), and allowed some random or blanket testing of correctional officers. The decision, which relied on the earlier Third Circuit decision in *Shoemaker*, stressed the special character of prisons including the heightened need for security which results in a reduced expectation of privacy. "While the prison officials have the same legitimate interest in maintaining prison security discussed supra, the infringement upon the privacy interest of correctional institution employees, already diminished, is lessened." McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987). To the extent that this case is based upon a reduced expectation of privacy enjoyed by prison guards, it is not broadly applicable to other government workers. In fact, the permission to test randomly was limited to "those employees who have regular contact with the prisoners on a day-to-day basis in medium or maximum security prisons." *Id.* at 1308. Other testing required reasonable suspicion. "Urinalysis testing within the institution's confines, other than uniformly or by systematic random selection of those employees so designated, may be made only on the basis of a reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts in light of experience that the employee is then under the influence of drugs or alcohol or that the employee has used a controlled substance within the twenty-four hour period prior to the required test." *Id.*

Although the actual scope of the opinion seems narrow, there is unfortunate language that suggests urinalysis is less intrusive in general than blood tests. This conclusion is arrived at with little or no analysis and without addressing the arguments for intrusiveness which have been outlined here. It seemed to be based on no more than the fact, pointed out in *Capua*, that drug testing did not require actual intrusion into the body. As noted here, there are many other elements of urinalysis which heighten the intrusive value of it. The well reasoned dissent of Chief Judge Lay notes "A search's intrusiveness does not hinge merely upon whether or not a person's skin is punctured or body touched in some way, but must be evaluated in terms of the individual's legitimate expectations of privacy in the context in which the search is conducted." *Id.* at 1311. There is great danger in concluding that an activity which does not seriously intrude upon privacy values without a very careful and complete examination of those values. This analysis was lacking in the majority opinion in *McDonell*. In this regard, the portion of the district court opinion which was modified is still a worthwhile read. In deciding that only reasonable suspicion would justify blood or urine samples, Chief Judge Vietor carefully balances the governmental interests and personal privacy interests involved and stated:

> Defendants urge in support of taking blood and urine samples of employees the same reasons urged for searching employees' cars parked outside the gates — identifying possible drug smugglers. So might searches of employees' homes and taps on their telephones. The possibility

of discovering who might be using drugs and therefore might be more likely than others to smuggle drugs to prisoners is far too attenuated to make seizure of body fluids constitutionally reasonable. Defendants also argue that taking body fluids is reasonable because it is undesirable to have drug users employed at a correctional institution, even if they do not smuggle drugs to inmates. No doubt most employers consider it undesirable for employees to use drugs, and would like to be able to identify any who use drugs. Taking and testing body fluid specimens, as well as conducting searches and seizures of other kinds, would help the employer discover drug use and other useful information about employees. There is no doubt about it — searches and seizures can yield a wealth of information useful to the searcher. (That is why King George III's men so frequently searched the colonists.) That potential, however, does not make a governmental employer's search of an employee a constitutionally reasonable one.

McDonnell v. Hunter, 612 F. Supp. 1122, 1130 (S.D. Iowa 1985), *modified*, 809 F.2d 1302 (8th Cir. 1987).

Prisoners also can be randomly tested, the Eighth Circuit held in upholding a summary judgment for the defendants in a § 1983 action by prisoners. In Spence v. Farrier, 807 F.2d 753 (8th Cir. 1986), the court explicitly rested its decision both on the unique security needs of prisoners *and* on the already reduced expectation of privacy which prisoners have. A dissent by Chief Judge Lay reminded the majority that the record had not documented the need for such tests or that a reasonable suspicion standard for testing would not adequately protect the legitimate interest in prison security. "In its opinion granting summary judgment to the state penitentiary, the district court made no findings of fact that the prison officials had demonstrated actual past or present drug abuse by inmates which in fact threatened the security of the institution. Moreover, a review of the record yields little, if any, factual basis to support such findings." *Id.* at 758 (Lay, J., dissenting).

After this article was at the printer, the Fifth Circuit, by a 2-1 vote, reversed the district court and upheld a testing program for some customs workers in National Treasury Employees Union v. Von Raab, No. 86-3833 (5th Cir. Apr. 22, 1987) (Westlaw, Allfeds library). The majority opinion first held "that compulsory urine testing by the government constitutes a search for purposes of the fourth amendment," *Id.* The court then held the program under review to be reasonable, using a totality of the circumstances test.

The court stated that urinalysis was less intrusive than "an invasion of bodily integrity or of the home." *Id.* Only employees applying for certain sensitive job categories (which the court imperfectly analogized to pervasively regulated industries) would be tested. The test time and date was announced five days in advance. The employee was not observed while urinating (although a supervisor was to listen for the sounds of urination). Less intrusive means were deemed to be unavailable and the need to test was deemed to be great. The procedures included confirming tests and other safeguards. The court specifically distinguished *Capua* where many of the above safeguards were not present.

This case is a break from the cases discussed above. Although it stresses the narrowness of the program approved, it is significantly broader than previous cases approving mass testing and is not limited as those cases are. It remains to be seen whether this case will persuade other courts to abandon the trend against mass testing which seemed to be developing.